United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4208

United States Court of Appeals

For the Second Circuit.

HENDERSON TRUMBULL SUPPLY CORPORATION,
Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,
REGION 2,
Respondent.

PETITION FROM THE NATIONAL LABOR RELATIONS BOARD.

BRIEF FOR PETITIONER.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1975

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Statement of Issues.

1) Did the National Labor Relations Board err in failing to apply an objective "impact" standard in connection with misrepresentations made to employees prior to a Union election?

2) Did the National Labor Relations Board err in failing to find that the misrepresentations made in connection with a Union election were material misrepresentations requiring that the election be set aside as a matter of law?

Statement of the Case.

This is a petition for review of the order of the National Labor Relations Board (hereinafter the "Board") acting through Chairman Betty S. Murphy and Messrs. Howard Jenkins, Jr., and John A. Panello affirming the rulings, findings and conclusions of Administrative

Law Judge Morton D. Friedman who ordered that Henderson Trumbull Supply Corporation (hereinafter sometimes "the Company") cease and desist from its refusal to bargain collectively with Teamsters Local 191 and rejecting the Company's claim of election irregularities. *Henderson Trumbull Supply Corporation and Teamsters Local 191,* 220 NLRB No. 42 (September 11, 1975).

Prior proceedings.

This case originated from a Board order in *Henderson Trumbull Supply Corporation and Teamsters Local 191,* 205 NLRB No. 8, 83 L.R.R.M. 1660 (August 6, 1973), granting summary judgment, without an evidentiary hearing, in favor of Teamsters Local 191 on objections raised by the Company with respect to pre-election conduct of the Union and ordering the Company to cease and desist from refusing to bargain. A petition to review and set aside that order was taken to this Court. *Henderson Trumbull Supply Corporation v. NLRB,* 501 F. 2d 1224 (2nd Cir. 1974). The Court of Appeals held that the evidence presented by the Company's objections raised substantial and material factual issues requiring an evidentiary hearing. The case was remanded for further proceedings consistent therewith. *Henderson Trumbull Supply Corporation v. NLRB, supra,* at page 1231. Pursuant to the remand, Administrative Law Judge Morton D. Friedman took evidence and rendered his "Decision on Remand" on March 26, 1975, which incorporated by reference the conclusions of law made by the Board in *Henderson Trumbull Supply Corporation and Teamsters Local 191,* 205 NLRB No. 8, 83 L.R.R.M. 1660 (August 6, 1973).

This decision was affirmed by the Board in all respects. *Henderson Trumbull Supply Corporation and Teamsters Local 191,* 220 NLRB No. 42 (Sept. 11, 1975) (A-1).[1]

Statement of Facts.

The recitation of facts in this Court's prior opinion and by the Administrative Law Judge on remand are more than sufficient for the purposes of this petition. However, for ease of reference there are set forth below those facts which are particularly relevant to the claims being made herein. For a more detailed exposition reference is made to the records and briefs submitted on the earlier petition.[2]

Two days prior to a vote by employees of the Company on their representation *vel non* by Local 191, the Union held a meeting presided over by Mr. Anthony Rossetti, the Union's Business Agent (A-7). At that meeting Mr. Rossetti stated that the Company had made in excess of one million dollars ($1,000,000) (A-13).

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[1]In both the initial determination of the Board and the Decision on Remand official notice of the record was taken in cases numbered 2-CA-12796 and 2-RC-15878. Case No. 2-CA-12796 related to the claim by the National Labor Relations Board that the Company engaged in unfair labor practices. Case No. 2-RC-15878 related to the exceptions taken by the Company to the representation proceeding. A more detailed history may be found in the Administrative Law Judge's decision set forth in the appendix which is referred to herein by the symbol (A-).

[2]The docket number on the Company's first petition is Case No. 73-2441.

The reaction of the employees was one of surprise (A-9). Gerald Cataldo, a truck driver, thought he must be getting "screwed." Peter Garrick, also a truck driver and in attendance at the meeting, testified that the conversation concerned wages and the probability of obtaining an increase (A-10). It was at that time that the statement was made that the Company had made a million dollars (A-10), which Garrick thought could provide a basis for an increase in wages and benefits (A-111). Mr. Garrick was shocked at the amount of money made by the Company but at the same time overjoyed at the prospect of sharing in this wealth (A-10, 112).

Steve Atkins, another employee who attended the meeting, indicated that prior to the arrival of the Union's Business Agent the men were attempting to figure out where the money would come from to provide the desired increase in benefits and wages through Union representation (A-11, 133). When Mr. Rossetti arrived, he told the employees that Henderson Trumbull had made a million dollars (A-13, 111). After the million dollar figure was thrown out, all in attendance "gasped" and felt they were getting the "shaft" from Henderson (A-134). Mr. Atkins justifiably concluded that if the Company were able to make that much money the employees should be given at least an equitable pay scale and accompanying benefits (A-134). Everyone was angry when they heard the million dollar figure and no determination was made as to the correctness of that figure until after the election (A-138). To Mr. Atkins it was a question of neglect and exploitation, and he left the meeting understandably upset with a Company that cared only for a few and not for the employees who had expended their labor for the benefit of the Company (A-11, 144).

Each of the foregoing employees testified that the million dollar figure did not change or affect their vote. They were going to vote for the Union in any event (A-185). The statement, however, was false. From the fiscal year figures that were available in June of 1972, sales for the year ending March 31, 1971, were in the amount of $843,637; gross profit on such sales was in the amount of 0260,371 and a net income, after taxes to the corporation was in the amount of $11,669 (A-12). The next year's figures were slightly higher. Gross sales were in the amount of $973,903 and the net income to the corporation after taxes was in the amount of $16,873 (A-12). By secret ballot on June 14, 1972, the employees approved representation by Local 191. Of the fifteen eligible voters in the unit, seven (7) voted for the Union, six (6) voted against, and two (2) abstained (A-5).

The Administrative Law Judge specifically found that the Union Business Agent was a person in a position to know the facts, that he did in fact say that the Company "made" a million dollars, and that the Company had no opportunity to reply (A-13). He went on to hold that the statement, while ambiguous, had no effect on the vote of those employees who testified, and for this reason concluded that the remand of this Court to determine the meaning of the word "made" was academic (A-13).

POINT I.[3]

The Administrative Law Judge erred in applying a subjective test.

The colloquial employee reaction to the million dollar statement is a far more eloquent statement of impact than anything that counsel might in good conscience include in this brief. See Levy, *How to Handle an Appeal*, §7.362 (P.L.I. 1968). Phrases such as we got "screwed" and we were "shafted" are unequivocal in meaning. In the light of the obvious effect of the misrepresentation, it is difficult to understand how the Administrative Law Judge was able to conclude that the Business Agent's misrepresentation might reasonably be construed as having no impact upon the election. The short answer would appear to be that he avoided the obvious based upon a misunderstanding of the underlying legal principle.

The principle of law is clear enough. A material factual misrepresentation requires setting aside an election where it is determined that the statement might reasonably influence the employees voting in that election. *Henderson Trumbull Supply Corporation v. NLRB*,

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[3]The order of argument set forth below is an artificial division between errors made by the Administrative Law Judge in 1) applying a wholly incorrect legal test to determine the impact of the misrepresentation on the election, and 2) in failing to reach the ineluctable conclusion that the election should be set aside on the subordinate facts revealed by the testimony. In point of fact, the misapplication of the law with regard to the influence of the misrepresentation on the election probably led to his failure to apply the correct legal principles to the subordinate facts. As such, the claims of error are so intertwined that they are not easily separated. Nevertheless, for ease of analysis, an attempt has been made to bifurcate the issues realizing that it is merely a conceptual division.

supra, at page 1229. The test is an objective one requiring the determination (1) that the statement is a substantial departure from the truth and (2) that it might reasonably be expected to have an impact on the election. This is the Board's own rule. *Hollywood Ceramics Company, Inc.,* 140 NLRB 221, 51 L.R.R.M. 1600 (1962).

While the Administrative Law Judge recognized the rule, he did not apply it—presumably because he found as a fact that those employees who testified had already made up their minds to vote for the Union and that their decision would not be altered by the misrepresentation. He wrote with respect to the misrepresentation:

> "However, whether this had any impact on the employees is another, entirely different question. A close examination of the testimony as set forth heretofore in this decision shows that the only three employees produced by the Respondent to testify as to such impact were not influenced by the statement as to the possibility that the Respondent 'made' 1.3 million dollars. All three employees, or rather, former employees, testified almost uniformly to the affect that what Rossetti stated at that meeting on the night of June 12, 1972, had no influence upon the way they voted in the election and that each had made up his mind prior thereto, and that what Rossetti stated had not caused any of them to change their respective minds" (A-14).

That the employees were not persuaded to change their minds comes as no surprise. One is not likely to change his mind if his expectations are buttressed. Nevertheless, the Administrative Law Judge concluded that the election should not be set aside as the statement had no impact in fact.

The question, however, is not whether these particular employees would have changed their vote. Obviously, they would not. The question is the influence which the misrepresentation might reasonably have had on the conduct of a fair election. Certainly, the laboratory conditions so often referred to by the Courts need not be antiseptic. However, what is required is an atmosphere of free and informed choice based upon the truth. *National Labor Relations Board v. Millard Metal Service Center, Inc.*, 472 F. 2d 647 (1st Cir. 1973). By virtue of the misrepresentation made in the instant case, this was totally lacking.

The test suggested by the Court of Appeals in *Henderson Trumbull* is the same as that applied in other circuits. While subjective reaction to determine objective impact is admissible, the ultimate question of law must be whether the misrepresentation might reasonably have tainted the election process to such an extent as to require setting it aside. "In making such a determination both objective and subjective evidence should be considered."[4] *NLRB v. Skelly Oil Co.*, 473 F. 2d 1079 (8th Cir. 1973). However, the ultimate issue is whether there was such interference with the exercise of free choice that the election result might well have been affected.

With this standard to follow it is difficult to understand the Board's note in adopting the decision of the Administrative Law Judge.

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[4]While not briefed, the record is replete with evidentiary errors committed by the Administrative Law Judge. As it is supposed that the genesis of these errors is in his misunderstanding of the underlying legal principle, the errors are not dealt with separately (see: A-35, 134, 139, 140, 145, 151).

> "In adopting the Administrative Law Judge's Decision on Remand, we do so because we accept the court's opinion as the law of this case and particularly as to the consideration of subjective reactions of employees to the statements in issue."

This, of course, was not the Court's opinion nor was it the "law of this case." The remand specifically asked for a finding as to the interpretation of the phrase "made a million dollars." This was expressly ignored in favor of a finding that those employees who testified would not have changed their vote in any event. In making that finding the Administrative Law Judge applied an erroneous test which, unfortunately, led him to an erroneous conclusion. He misinterpreted (as did the Board) the first test suggested by this Court that "(a)mong the factors to be considered besides the materiality of the factual misrepresentation itself are (1) the influence that it *might reasonably have had* on the employees, * * *" (Italics supplied.) *Henderson Trumbull Supply Corporation v. NLRB, supra,* at page 1229.

Not only did the Administrative Law Judge apply an erroneous test but he failed to realize that the gravity of any falsehood can only be measured in terms of its truthful corollary. This, of course, is one reason for ulitizing an objective test. In terms of the subordinate facts presented by this case, one can only speculate what the reaction of the employees might have been had they been told the truth, i. e., that the corporation made eleven thousand six hundred and sixty-nine dollars ($11,669) rather than one million dollars ($1,000,000). Certainly, it

was a matter of concern to Mr. Atkins.[5] He, and apparently others, were aware that the desired improvement in wages and benefits must be paid for by someone. Had the employees been told the true financial picture, they might well have changed their minds. Utilizing the objective test, it is clear from the testimony of the employees that the statement provoked an impact which can only be construed as one that might reasonably have had an influence upon the employees attending the meeting.

The practical consequences of the Administrative Law Judge's application of a specific impact test had the

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[5]The transcript of the testimony of Mr. Atkins reveals the following (A-133):

> "Q. Can you tell us what exchanges took place after his arrival?
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> "By that I mean questions asked and answers given or discussions. A. Well, in the meeting before Tony arrived we had been like I said, trying to figure out where the money would come from, where such and such benefits would come from, from Henderson Trumbuli or whether they would be from the union or what.
>
> "So, we had gotten to the point where we just had no answers.
>
> "We just, you know, we couldn't figure out where all the benefits would come from and somehow a million dollars was tossed into the air and it just—
>
> "Q. Tell us what you recall about that.
>
> * * *
>
> "A. After the million dollars was thrown out, everyone was—everyone gasped and said, wait a minute, a million dollars?
>
> "That's a lot of money to be talking about and it was still the period of time when we were all feeling that we were getting the shaft from Henderson because if they had been able to make that much money we figured that they should be able to give us at least—well, an equitable pay scale and a few benefits."

anomalous result of completely ignoring the truth. Such a standard would encourage rather than discourage misrepresentations by both Company and Union officials alike. Under the Board's test, the misrepresentation may be simply rationalized by a showing that the employee had previously made up his mind "yea" or "nay."[6] Such a concept is diametrically opposed to the process of a fair election.

POINT II.

The misrepresentation made requires that the election be set aside as a matter of law.

In *Henderson Trumbull Supply Corporation v. NLRB*, 501 F. 2d 1224 (2nd Cir. 1974), the Company, in its brief, attempted to persuade this Court that the misrepresentation concerning the Company's profits was of such magnitude that it could set aside the election as a matter of law. Citing: *NLRB v. Millard Metal Service Center, Inc.*, 472 F. 2d 647 (1st Cir. 1973); *Walled Lake Door Co. v. NLRB*, 472 F. 2d 1010 (5th Cir. 1973); *NLRB v. Southern Foods, Inc.*, 434 F. 2d 717 (5th Cir. 1970); and *NLRB v. Bata Shoe Company*, 377 F. 2d 821 (4th Cir. 1967). Each of these cases stands for the proposi-

[6]In this regard, a reasonable characterization of the testimony is that two of the employees might well have changed their minds but for the misrepresentation (A-186). This throws considerable doubt on the conclusion of the Administrative Law Judge. At least two of the employees made their decision after the misrepresentation.

tion that where the four-prong test[7] is met there is a per se violation of the laboratory conditions requiring the election to be set aside.

The Court rejected this invitation on the basis that it was not in a position to determine the meaning ascribed to the misrepresentation absent a hearing. It wrote at page 1230:

> "In sum, we hold that the evidence in this case as to the misrepresentation of the Company's profits raised a 'substantial and material factual issue' as to the employees' exercise of a free choice. It supports the charge that a person apparently in a position to know the facts had misrepresented a material fact (i. e., the amount of money available for increase in employees' wages and benefits) in a manner and at a time which deprived the Company of an opportunity to respond. This claim, together with the written statements obtained by the Regional Director himself, prima facie warranted setting aside the election which the Union won by only one vote. *NLRB v. Bata Shoe Co.*, 377 F. 2d 821 (4th Cir. 1967), cert. denied 389 U. S. 914 (1968). Where, as here, an election is extremely close, even minor misconduct cannot be summarily excused on the ground that it could not have influenced the election. See *NLRB v. Skelly Oil Co.*, 473 F. 2d 1079, 1085 (8th Cir. 1973); *NLRB v. Gooch Packing Co.*, 457 F. 2d 361, 362 (5th Cir. 1972). In this case, absent a hearing there was no justification for the Regional Director or the Board to assume that the employees

[7] In *NLRB v. Southern Foods, Inc.*, the test suggested was as follows: 1) whether there had been a misrepresentation of material fact which 2) the declarant was in a position to know, to which 3) the opposite party had no opportunity to reply, and 4) which the employees could not evaluate from their independent knowledge.

> must have interpreted the alleged statement by Rossetti as a reference to 'gross' revenue or as an uninformed guess. Indeed the reasonably probable interpretations were precisely the opposite."

As is noted above, the hearing was not altogether helpful in determining the question posed by the Court of Appeals. Nevertheless, in discussing Rossetti's statement, the Administrative Law Judge found that the word "'made' might have been somewhat ambiguous" (A-14), but that at least Atkins knew it did not mean profit (A-15), and that Atkins later explained to Cataldo and Garrick that the amount was not profit but a figure before the deduction of operating expenses and other costs. He wrote:

> "Thus, I find and conclude that from the testimony of the employees, Rossetti did make a statement to the effect that the Respondent 'made' somewhere in the neighborhood of 1 million dollars during the preceding year. However, I further find that at least with regard to the employees who testified at the hearing herein and at least one other employee the word 'made' did not mean 'profit' after Atkins' explanation to them" (A-15).

He then concluded that there had been no impact as the employees who testified would not have changed their vote, and the meaning attributed to the statement was irrelevant.[8]

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[8]One can only speculate why the Administrative Law Judge felt obliged to find that there had been no impact on the employees if there had been no misrepresentation. The short answer would appear to be that he must have determined, as the facts show, that the million dollar statement was a material misrepresentation.

The transcript reveals an entirely different meaning to the statement than that found by the Administrative Law Judge. Mr. Atkins testified that he personally questioned Rossetti about the million dollars and "(h)e definitely made the point that it was before taxes and before the profit was taken out. In other words, it was the gross profit of Henderson Trumbull for 1971" (A-136). "It was never resolved as to what was right, wrong or what the amount was until after the election * * *" (A-138), "and it was from that point on that the employees wanted to screw Henderson Trumbull" (A-139). Shortly after the meeting Atkins explained to Garrick and Cataldo that the million dollar figure was before taxes (A-184). Both decided to stick to their decision to vote for the Union (A-185). As such, this Court's prediction that the statement was probably interpreted as being "profit" rather than "sales" was entirely correct. Based upon the undisputed testimony that gross profit was $260,371, the representation was approximately a million dollars off the mark.

In the cases cited above, the misrepresentation held to be sufficient to set aside the election was considerably less outrageous than the statement before this Court. In *NLRB v. Millard Metal Service Center, Inc., supra,* the misrepresentation was contained in a letter comparing wage rates of similar unionized plants to those at Millard Metal. Although the letter was accurate, the Court noted that it gave a distorted picture as the rates would apply to only a few of the employees at the company plant. The election was set aside as a matter of law.

Comparatively, *Walled Lake Door Co. v. NLRB, supra,* presented a similarly less offensive misrepresentation. The Union stated that four plants in the Town of

Walled Lake were represented by unions suggesting to the employee that they should also be represented by a union. The representation was false and the Court set aside the election on the basis that the misrepresentation constituted an interference with the employee's free choice. *NLRB v. Southern Foods, Inc., supra,* involved a misrepresentation, by a union representing employees at a competitor plant, that the competitor had offered more in negotiations by way of wages and benefits than were paid by Southern Foods. The Court denied enforcement of the Board's order. So also in *NLRB v. Cactus Drilling Corp.,* 455 F. 2d 871 (5th Cir. 1972), cited by this Court in *Henderson,* the Court set aside an election in which the union represented that all drilling companies for whom some of the employees of Cactus also worked, would have to roll back wages if the union was not elected to represent them. On this basis, the election was set aside.

Surely if a wage distortion of 42 cents an hour, as found in *Millard,* constituted a sufficient misrepresentation to set aside an election, a misrepresentation of approximately a million dollars in connection with profits must fall within that same category.

Since this Court's decision in July of 1974, a number of other cases have come down from other Courts of Appeals dealing with analogous problems. In *Aircraft Raido Corp. v. NLRB,* F. 2d , 89 LRRM 3060 (3rd Cir. 1975), the Third Circuit was faced with campaign literature which misrepresented sales and profits of a division of Cessna Aircraft Company. The Court wrote:

> "Courts of appeals in several circuits have held that misinformation about company profits can be material, since the extent to which employees share

> fairly in the results of their labors is of great interest to them. *Argus Optics v. National Labor Relations Board*, 515 F. 2d 939, 89 LRRM 2280 (No. 74-1860, 6th Cir. May 5, 1975); *Henderson Trumbull Supply Corporation v. National Labor Relations Board*, 501 F. 2d 1224, 86 LRRM 3121 (2nd Cir. 1974); *National Labor Relations Board v. G. K. Turner Associates*, 457 F. 2d 484, 79 LRRM 2932 (9th Cir. 1972). In *Tyler Pipe & Foundry Company v. National Labor Relations Board*, 406 F. 2d 1272, 70 LRRM 2739 (5th Cir. 1969), the union allegedly misstated the company earnings. Although the Board determined that employees would not have been affected, the court on review said:
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> "'We cannot accept the Board's complacency * * *
>
> "'[I]n a case where election propaganda is challenged by a party to the election, the ultimate question before the Board is *whether the propaganda has lowered the standards to the point where it may be said that the uninhibited desires of the employees cannot be determined from the election.* Those influences, regardless of their truth or falsity, which make impossible an impartial test, are grounds for invalidation of an election.' 406 F. 2d at 1275 (italics in original)."

The Court concluded that as 1) the balloting was so close and 2) the misrepresentation met the material standard, the election should be set aside.

So also in *NLRB v. Mr. Fine, Inc.*, F. 2d , 89 LRRM 2974 (5th Cir. 1975), the Fifth Circuit was presented with a misrepresentation concerning minimum wages which the Regional Director concluded, without hearing, was not a misrepresentation. In ordering that the Company have the right to a hearing, the Court noted that where a false or misleading statement had the effect

of interfering with a free choice of bargaining representatives, the issue becomes one of law and a question for the Court. The Court continued:

> "Purportedly authoritative and truthful assertions concerning wages and pensions of the character of those made in this case are not mere prattle; they are the stuff of life for Unions and members, the selfsame subjects concerning which men organize and elect their representatives to bargain."

Again, *LaCrescent Constant Care Center v. NLRB*, F. 2d , 88 LRRM (8th Cir. 1975), the Eighth Circuit was faced with a misrepresentation pertaining to the Company's profit position and the assertion that it could pay higher wages. In that case the Company, using the *Hollywood Ceramics* standard challenged the conclusion of the Board based upon the evidence in the record. The Court wrote:

> "However, a point may be reached where the pre-election propagandizing has created an atmosphere rendering the free choice of a bargaining agent by the employees highly improbable. In such event the election must be invalidated. Here it is conceded that the Union organizer made misstatements of fact. They pertained to wages, 'the stuff of life for Unions and members, the selfsame subjects concerning which men organize and elect their representatives to bargain.' In this situation, where the vigorously contested ability of the Company to pay higher wages assumed primary importance in the pre-election campaigning, the misrepresentation found to have been made cannot be regarded as other than material."

It is suggested that on the record below and the decisions both before and after this Court's opinion in the first *Henderson* case, that the election should now be set

aside as a matter of law. Profits, the great expectation of higher wages, were misrepresented by approximately a million dollars; the statement admittedly came from one in a position to know the truth; the Company could not reply; and the employees could not evaluate. The subordinate facts leave no doubt that the misrepresentation might reasonably have influenced the employees and did, in fact, influence the employees. The Administrative Law Judge's finding to the contrary is unsupported by the subordinate facts and is based upon a completely erroneous interpretation of the applicable law.

In sum, the election, won "by the least possible whisker," was not conducted in an atmosphere of informed choice based upon the truth but upon calculated falsehoods invidious to the election process. See: *NLRB v. Gooch Packing Co.*, 457 F. 2d 361 (5th Cir. 1972).

Conclusion.

For the foregoing reasons, it is respectfully requested that the matter be remanded to the Board with direction that the election be set aside.

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